original

80131-2

NO. 34125-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JACOB GAMBLE,

Appellant.

BRIEF OF APPELLANT

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PM 7/10/06

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I. ASSIGNMENTS OF ERROR

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III. STATEMENT OF THE CASE

A jury has twice found that the March 26, 1999, actions of defendant Jacob Gamble and others led to the death of Daniel Carroll.

A. Prior appeal history.

The Clark County prosecutor charged Gamble under a two count information. State v. Gamble, 118 Wn. App. 332, 72 P.3d (2003). Count I charged first degree felony murder with first degree and second degree robbery as the underlying felonies. Count II charged second degree murder with assault in the second degree

as the underlying felony. Id. Gamble was convicted of both charges. Both charges pertained to the same victim, Daniel Carroll.

Gamble appealed. In an unpublished opinion, this court reversed the first degree felony murder conviction because of insufficient evidence of Gamble's intent to rob Carroll. Gamble,116 Wn. App. 1016 (2003 Wash. App. LEXIS 1047). In a published opinion, the court reversed the second degree felony murder based upon the state Supreme Court's holding in Andress[1] that second degree assault was an invalid predicate offense and could not sustain a conviction for second degree felony murder. Gamble, 118 Wn. App. at 335. The court fashioned a remedy directing that Gamble's case be remanded to the trial court for imposition of a first degree manslaughter conviction. Id. at 340.

The state Supreme Court accepted Gamble's petition for review only on the issue of this court's first degree manslaughter remedy. State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005). The Supreme Court disapproved of the remedy and sent Gamble's case back to the trial court for further proceedings in accord with this decision. Id. At 469-70.

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[1] In re Personal Restraint Petition of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002)

B. Action on remand.

On remand, the state charged Gamble with intentional murder in the second degree (count I) and first degree manslaughter (count II). CP 1, 92-93. The State put Gamble on notice of its intent to seek an exceptional sentence by specifying under both counts of the information that when Gamble committed the act Carroll was particularly vulnerable or incapable of resistance. CP 92.

Gamble made multiple pre-trial motions including argument that the re-filing of the charges was double jeopardy and violated the mandatory joinder rule. CP 2-10, 11-39, 101-04; RPI[2] 12-30, RPV 140. Gamble also objected to the additional language specifying that the State would seek an exceptional sentence upward. CP 40-52, 96-100; RPIII 88-102, RPV 130-140. The trial court entered an order denying all of Gamble's motions. CP 160-61.

Gamble was tried before a jury on November 7-17, 2005. RPIII-XV[3]. The trial was a mix of live testimony and reading from

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[2] "RP" followed by a number and sometimes a letter refers to the volume of verbatim the page number will be found in.
[3] This reference to the RP also includes all of the volume designated by a number and a letter, e.g. XIII-B.

trial transcripts of witness testimony from the first trial.[4] RPIII-XV. Gamble did not object to this arrangement.

After the testimony was taken, the court discussed jury instructions at length. RPXIIIB 1388-1432. Gamble proposed a lesser included instruction of second degree manslaughter. See Supp. CP; RPXIII 1404. The state objected to the instruction. RPXIII 1404. The court found that the evidence did not support the instruction. RPXIII 1404-07. Gamble objected to the failure to give the instruction. RP XIII 1435. The jury returned a not guilty verdict on the second degree intentional murder but convicted on the first degree manslaughter. CP 145-46. After the verdict was announced, the court orally instructed the jury on the aggravating factor based on Carroll's unconsciousness. CP 147-48; RPXIV 1590. After more deliberation, the jury returned a special verdict answering in the affirmative that Carroll was especially vulnerable. CP 149.

At sentencing, the state asked that the court impose an exceptional sentence comparable to the sentence imposed for the original first degree felony murder conviction. RPXVI 1620. The

[4] Several of the witnesses from the first trial were in the military and stationed in foreign countries.

court imposed a 102-month sentence and added 48 months to reflect Carroll's vulnerability for a total of 150 months. CP 165, 167; RPXVI 1620.

Gamble made a timely appeal. CP 178.

C. Factual history.

March 26, 1999, Andrew "Drew" Young hosted a party for his high school friends while his parents were out of town. RPXIA 557. The host estimated that there were at least 50-60 people in attendance. RPXIA 557.

The focus of the trial testimony was on five persons: Phommahasay, Curtis Esteban, Daniel Carroll, Ryan May, and Jacob Gamble. All five attended the party at various times that evening and all were present as the party came to an abrupt end. XA 281-297, 338, XB 378-82, XI 558.

Phommahasay perceived that Esteban had slighted him or a family member in some fashion. RPXB 377. Phommahasay wanted to fight Esteban and made others at the party aware of his desire. RPXA 276. Phommahasay confronted Esteban outside on the front lawn. RPXB 405, 434. Phommahasay broke a beer bottle on Esteban's head. RPXB 405, 434. Esteban's friend, Daniel Carroll, ran toward the Phommahasay-Esteban fight and was

punched in the face by Gamble. RPXIA 630. Carroll fell backwards and landed on a cement sidewalk. RPXA 293. Gamble and Ryan May, both friends of Phommahasay, kicked Carroll while he was on the ground and not responsive. RPXA 296, 338.

Carroll died on April 1 after being taken off life-support by his family. RPXA 261, 263. He seemingly never regained consciousness after being initially hit by Gamble. RPXA 261.

Gamble was arrested shortly after the incident. He gave a taped statement to the police. RPXIIC 1193-1211. In the statement, which was played for the jury, Gamble said that he got caught up in the moment and intentionally punched Carroll, a person that he did not know. RPXIIC 1193-1211. He said that he kicked Carroll one time on the left side of his head and cussed at Carroll. RPXIIC 1193-1211.

Gamble did not testify but he called various witnesses. Forensic pathologist Dr. Brady opined that the blow to the back of Carroll's head when he fell on the sidewalk led to Carroll's death. RP 13A1249-52. Gamble also presented forensic evidence that the shoes he wore that night could not have caused some patterned bruising on Carroll's face. RPXIIIA 1275. Also, Gamble's clothing did not have blood on it despite testimony that Carroll's face was

very bloody and blood on the clothing would be expected if Gamble had stomped or repeatedly kicked Carroll as some witnesses described. RPXIIIA 1282.

IV. ARGUMENT

1. JACOB GAMBLE HAD ALREADY BEEN PLACED IN JEOPARDY BY HIS PRIOR CONVICTION AND SENTENCE FOR FIRST DEGREE FELONY MURDER IN THE DEATH OF DANIEL CARROLL. AS SUCH, JEOPARDY BARRED GAMBLE FROM BEING RE-SENTENCED FOR FIRST DEGREE MANSLAUGHTER IN THE SAME DEATH.

Multiple punishments for the same offense violate the state and federal constitutional guarantee against double jeopardy. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995) (citing Whalen v. United States, 445 U.S. 684, 688, 63 L. Ed. 2d 715, 100 S. Ct. 1432 (1980)). Protection against double jeopardy afforded by the United States Constitution stems from the Fifth Amendment, which provides, in part: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . . " U.S. Const. Amend. V. Protection against double jeopardy afforded by the Washington State Constitution stems from the Article I, Section 9, which provides, in part, "No person shall . . . in a criminal case, . . . be twice put in jeopardy for the same offense." The guarantee of the double jeopardy clause consists of three separate constitutional

protections. "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." State v. Wright, 131 Wn. App. 474, 478, 127 P.3d 742 (2006) (quoting North Carolina v. Pearce, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969)). Ours is an instance where the defendant, Jacob Gamble, was twice punished for the same offense, homicide.

In State v. Calle, 125 Wn.2d 769, our state supreme court discussed at length the meaning of "same offense" as it applies to double jeopardy analysis. In so doing, the court acknowledged it is the legislative branch that has the power to define criminal conduct and assign punishment for such conduct. The question whether punishments imposed by the court following conviction upon criminal charges are unconstitutionally multiple must be resolved by reviewing what punishments the legislative branch has authorized for the specific offenses. Id. at 776. The Calle court discussed

how the steps to take in making this determination when the answer is not expressly addressed in the statute itself.[5]

After Calle, in State v. Schwab, 98 Wn. App. 179, 988 P.2d 1045 (1999), the reviewing court turned to whether the legislature intended multiple punishments for a single homicide. Because there is not express legislative intent on this issue in the Washington Criminal Code (Title 9A RCW), the court turned to statutory construction and evidence of legislative intent. Id. at 182. Ultimately, the court found that,

> [O]ne killing equals one homicide; one unlawful homicide equals either murder, homicide by abuse, or manslaughter. From this we find that the legislature did not intend to provide multiple punishments for a single homicide.

Under our facts, Gamble has already been convicted of and punished for this homicide. The first time this matter was tried was in 2000. A jury convicted Gamble of both first degree felony murder (robbery) and second degree felony murder (assault) for the death of one person, Daniel Carroll. This court reversed the first degree felony murder based upon insufficient evidence. Because the

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[5] For example, RCW 9A.52.050 expressly authorizes cumulative punishment for crimes committed during the commission of a burglary.

reversal was for insufficient evidence, it cannot be retried. State v. Anderson, 96 Wn.2d 739, 638 P.2d 1205 (1982). See also Hudson v. Louisiana, 450 U.S. 40, 67 L. Ed. 2d 30, 101 S. Ct. 970 (1981); Burks v. Untied States, 437 U.S. 1, 57 L. Ed. 2d, 1, 98 S. Ct. 2141 (1978). Because of the Andress decision, this court reversed Gamble's second degree felony murder conviction; the state supreme court remanded to the trial court for undefined further action without giving consideration to a double jeopardy argument. On remand, Gamble was again convicted and punished for the same homicide of Daniel Carrroll. Schwab specifies that under a double jeopardy analysis, a person cannot be twice-punished for the same homicide. Gamble has been. He should not be. His first degree manslaughter conviction should be reversed and remanded for dismissal.

II. THE TRIAL COURT ABUSED ITS DISCRETION AND MIS-APPLIED THE ENDS OF JUSTICE EXCEPTION TO THE MANDATORY JOINDER RULE.

The mandatory joinder rule is set out in CrR 4.3.1 in relevant part,

> (b) Failure to Join Related Offenses.
>
> (1) Two or more offenses are related offenses, for purposes of this rule, if they are within the jurisdiction and

> venue of the same court and are based on the same conduct.
>
> (2) When a defendant has been charged with two or more related offenses, the timely motion to consolidate them for trial should be granted unless the court determines that because the prosecuting attorney does not have sufficient evidence to warrant trying some of the offenses at that time, or for some other reason, the ends of justice would be defeated if the motion were granted. A defendant's failure to so move constitutes a waiver of any right of consolidation as to related offenses with which the defendant knew he or she was charged.
>
> (3) A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense, unless a motion for consolidation of these offenses was previously denied or the right of consolidation was waived as provided in this rule. The motion to dismiss must be made prior to the second trial, and shall be granted unless the court determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

The ends of justice exception to the mandatory joinder rule has developed over time. *See*, State v. Carter, 56 Wn.App. 217, 783 P.2d 589 (1989) (Division I); State v. Dallas, 126 Wn.2d 324, 892 P.2d 1082 (1995); and recently State v. Ramos, 124 Wn.App. 334, 101 P.3d 872 (2004) (Division I). In neither Carter nor Dallas were the ends of justice exception to the mandatory joinder rule successfully adopted.

In Carter, 56 Wn. App. 217, defendant Carter was originally charged with first degree robbery. However, his trial on the robbery resulted in a hung jury and a mistrial was declared. On retrial, the prosecutor was allowed to amend the information to change the robbery to a single count of assault in the first degree. Id. at 218. Carter appealed.

On review, the court acknowledged that Carter had been deprived of effective assistance of counsel by trial counsel's failure to raise a mandatory joinder objection at the time the prosecutor moved to amend the original charge from one of first degree robbery to one of first degree assault. The State responded that to dismiss the case under mandatory joinder would defeat the ends of justice. Id. at 223. This was a bald assertion on the State's part not supported by argument or authority. Id. at 223. As such, the court refused to consider the State's ends of justice argument.

In Dallas, 126 Wn.2d 324, the court similarly declined to apply the ends of justice exception to the mandatory joinder rule under its facts. Defendant Dallas was charged in juvenile court with third degree possession of stolen property. At the conclusion of its case, the State moved to amend the stolen property count to third

degree theft. The trial court granted the motion and found Dallas guilty.

On appeal, the State conceded the amendment was improper. The Court of Appeals vacated the theft conviction and remanded without prejudice to the State's right to re-file. Dallas appealed to the state supreme court arguing that the dismissal should have been with prejudice. The Dallas court agreed that the dismissal should have been with prejudice and remanded for dismissal. Dallas, 126 Wn.2d at 326.

The purpose of CrR 4.3(c)[6] was discussed by this court in State v. Russell, 101 Wn.2d 349, 678 P.2d 332 (1984). The Russell court stated that issue preclusion was the rationale behind the rule. It based its view on American Bar Association (ABA) standards;

> "[T}he purpose of this section of the standards is to protect defendants from 'successive prosecutions based upon essentially the same conduct, whether the purpose in so doing is to hedge against the risk of an unsympathetic jury at the first trial, to place a "hold" upon a person after he has been sentenced to imprisonment, or simply to harass by multiplicity of trials.'" Russell, 101 Wn.2d at 353 n. 1 (quoting *ABA Standards Relating to Joinder and Severance* 19 (Approved Draft, 1968)).

[6] CrR 4.3(c) is the earlier version of CrR 4.3.1.

Thus, CrR 4.3(c) was intended as a limit on the prosecution. As such, it does not differentiate based upon the prosecutor's intent. Whether the prosecutor intends to harass or is simply negligent in charging the wrong crime, CrR 4.3(c) applies to require a dismissal of the second prosecution.

In State v. Ramos, 124 Wn. App. 334, Division I of the Court of Appeals ultimately discussed the ends of justice exception as it specifically applies to a case affected by the Andress decision.

In Ramos, co-defendants Ramos and Medina were charged with first degree intentional murder. They were convicted of felony murder as a lesser included offense with assault in the second degree as the predicate offense. Id. at 335-36. Both co-defendants' convictions were reversed due to the Andress decision. The State sought to file manslaughter charges. The appeal of the felony murder convictions challenged the convictions for various reasons. Various stays of the decision were granted pending supreme court opinions on related issues. Ultimately, the joinder issue was briefed and argued directly to Division I. Ramos, 124 Wn. App. At 337.

In resolving the mandatory joinder issue, the court looked to the Carter and Dallas opinions. The court reiterated that the ends

of justice exception to mandatory joinder only applies if (1) the circumstances are extraordinary and (2) those circumstances are extraneous to the action or go to the regularity of the proceedings. Ramos, 124 Wn. App. at 341. The court then held that the Andress decision did create an extraordinary environment that was extraneous to the trial and, as such, warranted the ends of justice exception to mandatory joinder and that the ends of justice exception to the mandatory joinder rule was a discretionary decision for the trial court. Ramos, 124 Wn. App. at 341-43. "Other factors may be relevant to determining the justice of further proceedings, and whether the ends of justice would be defeated by dismissing manslaughter charges against Ramos and Medina is, in the final analysis, a determination for the trial court." Id. In so holding, the Ramos court noted that unless the exception applied, the defendants would completely escape prosecution for the killing. Id. at 342-43. As such, the case was remanded to the trial court for further proceedings in line with the Court of Appeals decision.

Our facts are distinguishable from the application of the ends of justice exception found in Ramos. Here, originally, the State chose to file two separate charges against Gamble: felony murder in the first degree (robbery) and felony murder in the second

degree (second degree assault). At trial, the prosecutor successfully argued against the giving of first degree and second degree manslaughter jury instructions. The jury returned a guilty verdict on both first degree felony murder and second degree felony murder. Then Andress happened. And the court correctly dismissed the second degree felony murder. But the first degree felony murder stood on its own until this Court dismissed it for insufficiency of the evidence. As such, it wasn't as if Gamble was escaping prosecution. As such, the fear expressed in Ramos, that a person convicted of murder by a jury would completely escape prosecution for the killing, does not apply under our facts. The trial court abused its discretion when it held otherwise.

III. THE RECORD SUPPORTED A LESSER INCLUDED OFFENSE INSTRUCTION FOR MANSLAUGHTER IN THE SECOND DEGREE.

A criminal defendant may be held to answer only to those offenses contained in the information or indictment. State v. Fernandez-Medina, 141 Wn.2d 448, 453, 6 P.3d 1150 (2000). Consistent with that notion, Wash. Const. Art. I, Section 22 preserves a defendant's right to be informed of the charges against him and to be tried only for offenses charged. Id. In keeping with the constitutional requirement of notice, the lesser included offense

doctrine entitles the prosecution or the defendant to a jury instruction on a crime other than the one charged only if the commission of the lesser offense is necessarily included within the offense for which the defendant is charged in the indictment or information. RCW 10.61.006.

Our courts apply the two-pronged Workman test to determine whether a lesser offense is included within the charged offense. State v. Workman, 90 Wn. 2d 443, 447-48, 584 P.2d 382 (1978). First, under the legal prong, each of the elements of the lesser offense must be a necessary element of the offense charged. Id. Specifically, the elements of the lesser offense must be necessarily and invariably included among the elements of the greater charged offense. State v. Harris, 121 Wn.2d 317, 321-23, 325-26, 849 P.2d 1216 (1993). Here, the requirements of the legal prong are met. Second degree manslaughter necessarily and invariably includes the elements of manslaughter in the first degree. State v. Warden, 133 Wn.2d 559, 562-63, 947 P.2d 708 (1997). Second, under the factual prong, the evidence of the case must support an inference that only the lesser included offense was committed to the exclusion of the charged offense. Fernandez-Medina, 141 Wn.2d at 455. In other words, the evidence must

affirmatively establish the defendant's theory of the case as it is not enough that the jury might disbelieve the evidence pointing to guilt. Id. at 456. Instead, some evidence must be presented which affirmatively established the defendant's theory on the lesser included offense before an instruction should be given. State v. Berlin, 133 Wn. 2d 541, 546, 947 P.2d 700 (1997). If the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater offense, a lesser included offense instruction should be given. Beck v. Alabama, 447 U.S. 625, 635, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). Although there must be affirmative evidence from which a jury could find the defendant committed the lesser offense, the evidence can come from the State or the defendant because there is no requirement that the defendant offer the evidence or that the defendant's testimony cannot contradict the evidence. State v. Gostol, 92 Wn. App. 832, 838, 965 P.2d 1121 (1998).

Legal questions including alleged errors of law in a trial court's jury instructions are reviewed de novo. State v. Porter, 150 Wn.2d 732, 735, 82 P.3d 234 (2004). In determining if the evidence at trial was sufficient to support the giving of a lesser included instruction the evidence must be viewed in the light most

favorable to the party requesting the instruction. Fernandez-Medina, 141 Wn.2d at 455-56. As applied to our facts, this court must read the evidence in the light most favorable to Gamble, to determine whether it supported an inference that Gamble committed second degree manslaughter. Error in failing to give a legally and factually supported lesser included instruction is always reversible error. State v. Benn, 120 Wn.2d 631, 654, 845 P.2d 289 (1993); State v. Parker, 102 Wn.2d 161, 683 P.2d 189 (1984).

First degree manslaughter is committed when a person recklessly causes the death of another person. RCW 9A.32.060(1)(a). Second degree manslaughter is committed when a person, with criminal negligence, causes the death of another person. RCW 9A.32.070.

> RECKLESSNESS: A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.
>
> CRIMINAL NEGLIGENCE: A person is criminally negligent or acts with criminal negligence when he fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation.

RCW 9A.08.010(1)(c), (d).

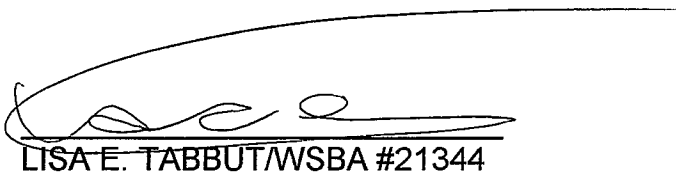
Gamble's failure to be aware of the substantial risk of Carroll's injury was the essence of the defense theory of the case. In Gamble's taped statement that was played for the jury, Gamble told how he had not been at the party for very long before this incident happened. He had a couple of beers after getting there. He was unaware of any desire on the part of Kevin Phommahasay to fight with Curtis Esteban. He did not know Daniel Carroll. He got caught up in the moment when he saw Carroll stagger toward the fray between Phommahasay and Esteban. He intentionally stuck Carroll in the face. He knew Carroll landed on the cement sidewalk. He kicked Carroll once on the side of the head and swore at him. He had not wanted to hurt Carroll.

V. CONCLUSION

Gamble's conviction for first degree manslaughter is double jeopardy as he has previously been convicted and punished for the same homicide. Additionally, the ends of justice exception should not have been applied to allow the filing of the manslaughter charge as it simply gave the State a second bite of the apple after the State failed to provide sufficient evidence of felony murder in the first degree to withstand challenge on appeal. Finally, the trial court

should have given a manslaughter in the second degree jury instruction at Gamble's request. Gamble is entitled to a new trial.

Respectfully submitted this 10th day of July, 2006.



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Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. JACOB GAMBLE, Appellant.	Clark County No. 99-1-00537-6 Court of Appeals No. 34125-5-II AFFIDAVIT OF MAILING

LISA E. TABBUT, being sworn on oath, states that on the 10th day of July 2006, affiant deposited in the mails of the United States of America, a properly stamped envelope directed to:

Anthony F. Golik
Clark County Prosecuting Attorney
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Vancouver, WA 98666

And

Mr. Jacob Gamble/DOC #806775
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And that said envelope contained the following:

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Dated this 10th day of July 2006.

LISA E. TABBUT, WSBA #21344
Attorney for Appellant

SUBSCRIBED AND SWORN to before me this 10th day of July 2006.

Stanley W. Munger
Notary Public in and for the
State of Washington
Residing at Longview, WA 98632
My commission expires May 24, 2008

STANLEY W. MUNGER
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NOTARY
PUBLIC
MAY 24, 2008
STATE OF WASHINGTON

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